Editor's note: 90 I.D. 550; Appealed -- aff'd, Civ.No. 84-6008-E (D. Ore. March 27, 1986), aff'd, No. 86-3782 (9th Cir. June 9, 1987), 819 F.2d 250, cert denied, 484 US 1005 (Jan. 11, 1988)

JOSEPH A. BARNES, ET AL.

IBLA 83-992 Decided December 13, 1983

Appeal from the decision of the Oregon State Office, Bureau of Land Management, denying a protest against patent 36-83-0013.

Affirmed.

1. Mining Claims: Patent

   The Bureau of Land Management properly determines the acreage of mining claims that have been conformed to surveyed legal subdivision of the township by reference to its official land status records.

2. Patents of Public Lands: Reservations -- Railroad Grant Lands

   Language in a patent of railroad grant lands that excludes mineral lands does not operate as a mineral reservation or diminish the estate vested in the grantee upon discovery of minerals in the land. The issuance of a railroad grant lands patent generally constitutes a conclusive determination by the United States of the nonmineral character of the land.

3. Mining Claims: Surface Uses -- Surface Resources Act: Verified Statement

   Acceptance by the Bureau of Land Management of mining claimant's verified statement under section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (1976), confirms only those rights to surface resources that the claimants held on July 23, 1955, as defined or limited by other existing law.

4. Mining Claims: Patent -- Mining Claims: Surface Uses -- Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Mining Claims

   The Bureau of Land Management properly reserves to the United States in a mineral patent for O & C revested grant lands the timber now on a mining claim subject to the Act of June 9, 1916, 39 Stat. 218, and the timber now or hereafter growing on a mining claim subject to the Act of Apr. 8, 1948, 62 Stat. 162.

5. Administrative Authority: Generally -- Constitutional Law: Generally -- Statutes

   The Department of the Interior, as an agency of the executive branch of the Government, is not the proper forum to decide whether a statute enacted by Congress is unconstitutional.

APPEARANCES: Edward Ray Fechtel, Esq., Eugene, Oregon, for appellants.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On June 15, 1983, the Oregon State Office, Bureau of Land Management (BLM), issued mineral patent No. 36-83-0013 to Joseph A. Barnes, Lucille N. Barnes, Peter J. Nemec, Agnes C. Nemec, and Clarence H. Berg for the Deep Diggins and High Bar placer mining claims encompassing 114.22 acres of land described as lots 9, 15, 18, 19, and 22, sec. 19, T. 29 S., R. 7 W., Willamette meridian, Oregon. The patent was issued subject to certain conditions, not at issue before this Board, and reserved to the United States a right-of-way for ditches and canals, also not at issue, and the following contested timber rights:

> 2. Under authority of Section 3 of the Act of June 9, 1916 (39 Stat. 218) the timber now on Lots 9, 15, 18, and 22 of the described land, excepting and excluding that 20-acre portion of the High Bar association placer covering the Oro Grande placer mining claim located July 19, 1938, and recorded July 23, 1938,

> in Book 11 at Page 135, Mining Records of Douglas County, Oregon, together with the right of the purchaser of the timber to enter upon the land and to cut and remove the timber;
>
> 3. The timber now or hereafter growing on that 20-acre portion of the High Bar association placer covering the Oro Grande placer mining claim located July 19, 1938, and recorded July 23, 1938, in Book 11 at Page 135, Mining Records of Douglas County, Oregon, together with the right to manage and dispose of the timber as provided by law, in accordance with and subject to the provisions of the Act of April 8, 1948 (62 Stat. 162);

On August 8, 1983, the patentees protested against the form in which BLM issued the patent, complaining that they are entitled to 121 acres of land and that because they have a vested right to the surface resources of the lands granted, the reservation to the United States of the timber reserves was improper. BLM denied the protest by decision dated August 17, 1983. The patentees thereafter filed a timely notice of appeal of BLM's decision to this Board and submitted a copy of their original protest letter as their statement of reasons.

As noted, appellants first complain that they are entitled to 121 acres, not 114.22 acres, of land by virtue of their application and payment for 121 acres. BLM responded that the actual acreage which their patent application encompassed was only 114.22 acres in accordance with appellants' notices of amended locations, dated January 27, 1964, for the two mining claims. 1/ BLM noted that a $15 overpayment was being processed for return to appellants.

[1] Appellants' patent application, OR 26402, initially submitted to BLM on April 14, 1981, identified the Deep Diggings claim as "60 acres, more

1/ The notices of amended locations were filed to conform the claims' land descriptions to the amended lottings of the supplemental plat of survey for sec. 19, T. 29 S., R. 7 W., Willamette meridian.

or less" described as lots 15 and 22, sec. 19, T. 29 S., R. 7 W., Willamette meridian, and the High Bar claim as "70 acres, more or less" described as lots 9, 18, 19, and 23, sec. 19, T. 29 S., R. 7 W., Willamette meridian. Thus appellants' application seemed to encompass approximately 130 acres of land in section 19.

Review of the master title plat for T. 29 S., R. 7 W., Willamette meridian, reveals, however, that the actual surveyed acreage for lots 15 and 22 is 38.35 acres and 19.43 acres, respectively, or a total of 57.78 acres for the Deep Diggings claim. The actual acreage for the High Bar claim is: Lot 9, 37.72 acres; lot 18, 9.27 acres; lot 19, 9.45 acres; and lot 23, 9.57 acres, or a total of 66.01 acres. Therefore, the two claims as described in appellants' patent application actually encompassed 123.79 acres, not 130 acres.

By letter dated December 22, 1982, BLM informed appellants that its mineral examiners had concluded that lot 23, 9.57 acres of the High Bar claim, was nonmineral in character. See Mineral Report, dated Aug. 27, 1982, and approved December 2, 1982, at 16. BLM indicated that appellants could withdraw their application as to lot 23 or BLM would institute contest proceedings against that portion of the claim. By a statement dated February 3, 1983, appellants withdrew their application as to lot 23, leaving the High Bar claim at 56.44 acres and the total acres for the two claims at 114.22.

Accordingly, we find that BLM issued patent No. 36-83-0013 for the proper acreage. It appears that appellants' acreage figure was calculated

based on the subdivision of sec. 19 as a regular 640-acre section which it is not. See Exh. B, Mineral Patent Application OR 26402.

Appellants' second complaint is against the reservation of the timber on the lands and related rights to the United States. Appellants argue first that the lands are not Oregon and California Railroad (O & C) revested grant lands subject to the Act of June 9, 1916, 39 Stat. 218, because they are mineral lands. Appellants point out that section 2 of the Act of July 25, 1866, 14 Stat. 239, granted public land, "not mineral," to the railroad and that the patent issued to the railroad excluded "[a]ll mineral lands, should any be found to exist in the tracts described above." Appellants contend that ownership of sec. 19, T. 29 S., R. 7 W., Willamette meridian, should be considered never to have passed to the railroad because sec. 19 was mineral land as evidenced by mining claims that had been located there before 1866. Appellants concluded that the railroad agent's affidavit in support of a patent for sec. 19 had to have been false and therefore sec. 19 was procured by fraudulent acts.

Appellants argue that the action of the Secretary of the Interior on February 25, 1920, to classify the lands at issue as class 2 timberlands under section 2 of the Act of June 9, 1916, 39 Stat. 219, was arbitrary and capricious and in excess of the authority granted him because the lands should have been excluded from the railroad grant as mineral lands in the first place or, alternatively, if the lands were within the purview of the 1916 Act, the Secretary failed to determine the amount of timber growing on the lands as required by the Act. Appellants assert that the portion of sec. 19 at

issue had less than 300,000 board feet of merchantable timber on each 40-acre tract. 2/

Appellants urge that the Act of April 8, 1948, 62 Stat. 162, superseded the 1916 Act regarding the rights of mineral entryman to the surface resources of revested O & C lands. They contend that it validated all mineral claims located on revested O & C lands, if otherwise valid, and restricted the rights to surface resources of only those claims located after August 28, 1937. Appellants state that all of the claims at issue were located prior to that date and note particularly that the Oro Grande placer mining claim was located on June 3, 1916, not in 1938.

Appellants also claim that the United States is estopped to deny their rights to surface resources by virtue of BLM's September 13, 1966, decision in contest No. Oregon 014538-A undertaken pursuant to section 5 of the Act of July 23, 1955, 30 U.S.C. § 613 (1976). Appellants argue that their rights to surface resources on the lands were adjudicated and accepted by BLM in that proceeding.

In its August 17, 1983, decision, BLM responded to each of appellants' arguments but found them unpersuasive.

It is helpful to set out the history of the O & C lands before addressing appellants' arguments. By Act of July 25, 1866, 14 Stat. 239, and

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2/ Class 2 was defined as: "Timberlands, which shall include lands bearing a growth of timber not less than three hundred thousand feet board measure on each forty-acre subdivision." 39 Stat. 219.

Act of May 4, 1870, 16 Stat. 94, Congress granted to the California and Oregon Railroad Company certain lands to aid in the construction of the railroad through Oregon. By the Act of June 9, 1916, 39 Stat. 218, Congress declared revested in the United States certain of the lands which had been granted to the railroad. Section 2 of the Act provided that the various lands would be classified as powersite lands, timberlands, or agricultural lands. Section 3 of this Act provided that the lands revested, except for lands classified for powersite purposes, would be open to exploration, entry, and disposition under the general mining laws if they were chiefly valuable for the mineral deposits contained therein. Section 3 also provided, however, that "any person entering mineral lands of class two shall not acquire title to the timber thereon, which shall be sold as hereinafter provided * * * but he shall have the right to use so much of the timber thereon as may be necessary in the development and operation of his mine until such time as such timber is sold by the United States." 39 Stat. 219.

Subsequently, Congress adopted the Act of August 28, 1937, 50 Stat. 874, 43 U.S.C. §§ 1181a-1181f (1976), which provided generally that O & C lands under the jurisdiction of the Department of the Interior that were classified as timberlands should be managed for permanent forest production and that the timber should be cut and sold in conformity with the principle of sustained yield. The Department interpreted the Act as partially repealing section 3 of the Act of June 9, 1916, in effect, so that lands classified as valuable for timber were deemed no longer open to mineral location or leasing. See Applicability of Mining Laws to Revested Oregon and California and Reconveyed Coos Bay Grant Lands, 57 I.D. 365 (1941).

Then Congress passed the Act of April 8, 1948, 62 Stat. 162, that provided:

> [N]otwithstanding any provisions of the Act of August 28, 1937 (50 Stat. 874), or any other Act relating to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands, all of such revested or reconveyed lands, except power sites, shall be open for exploration, location, entry, and disposition under the mineral-land laws of the United States, and all mineral claims heretofore located upon said lands, if otherwise valid under the mineral-land laws of the United States, are hereby declared valid to the same extent as if such lands had remained open to exploration, location, entry, and disposition under such laws from August 28, 1937, to the date of enactment of this Act: Provided, That any person who under such laws has entered since August 28, 1937, or shall hereafter enter, any of said lands, shall not acquire title, possessory or otherwise, to the timber, now or hereafter growing thereon, which timber may be managed and disposed of as is or may be provided by law, except that such person shall have the right to use so much of the timber thereon as may be necessary in the development and operation of his mine until such time as such timber is disposed of by the United States: Provided further, That locations made prior to August 28, 1937, may be perfected in accordance with the laws under which initiated.

Thus, Congress restored revested O & C lands to mineral location except that a locator of a mining claim could not acquire title to the timber "now or hereafter growing thereon."

The first issue for us to address is whether sec. 19, T. 29 S., R. 7 W., Willamette meridian, was patented to the railroad.

The mineral lands exception in the railroad grant acts was the subject of a number of early Supreme Court and Departmental decisions. In Central Pacific R. R. v. Valentine, 11 L.D. 238 (1890), Secretary Noble ruled that

discovery of the mineral character of land at any time prior to the issuance of the patent for it required exclusion of the land from any railroad grant which contains a provision excepting all mineral lands. This was in contrast to determining the status of the land for other purposes on the date that the route of the railroad line was definitely fixed. This construction was upheld in Barden v. Northern Pacific Railroad, 154 U.S. 288, 329-32 (1894). The Supreme Court also recognized in that case, however, that although the land office may not have always made the proper characterization of the lands involved in railroad grants, issuance of a patent was conclusive as to the status of the land absent direct proceedings voiding the patent. It noted:

> It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. * * * The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title.

154 U.S. at 330.

Until 1903, patents issued under the railroad grant acts in most instances contained language excepting mineral lands. Since this language

might have been construed as allowing the Federal Government to reclaim lands for which patent had issued if they later were found to contain mineral reserves, a railroad company requested that the Secretary of the Interior eliminate the excepting language from its patents. The Secretary reviewed pertinent decisions of the Supreme Court and concluded that the issuance of a patent under the railroad land grant acts is determinative of the nonmineral character of the lands for the purposes of the grant. Northern Pacific Railway, 32 L.D. 342, 344 (1903). The Secretary concluded with a directive to the General Land Office to exclude language from future railroad land grant patents.

The Supreme Court subsequently reviewed the same issue in Burke v. Southern Pacific R.R., 234 U.S. 669 (1914). The court concluded that the General Land Office was without authority to issue patents with language excepting mineral lands because the granting Act contemplated that only non-mineral lands would be patented and that the patents would unconditionally pass title. The court stated as well that

> a bill in equity, on the part of the Government, [may] lie to annul the patent and regain title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill * * *; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers who had no interest in the land at the time the patent was issued and were not prejudiced by it.

234 U.S at 692.

[2] In summary, once patents issued, the railroad company held full and complete title to the lands. The minerals were not reserved to the United

States because mineral lands could not be included in a railroad grant. Furthermore, such patents cannot now be attacked by persons in appellant's circumstances because, as we shall see, appellants had no interest in the lands at the time the patent was issued. George Antunovich, 76 IBLA 301, 90 I.D. 464 (1983); Diane B. Katz, 48 IBLA 118 (1980).

[3, 4] With the exception of the Oro Grande claim, appellants and BLM agree that the claims on which this patent is based were located after 1916 when the lands were opened to entry under the 1916 Act. As to the Oro Grande claim, BLM found that it has an effective location date of July 19, 1938. Appellants assert that it was located on June 3, 1916. The record shows, as BLM found, that the Oro Grande claim is a relocation of the original Van Gundy claim. That claim was located on June 3, 1916, and consequently was null and void ab initio because on that date the land was still patented to the railroad without a reservation of the minerals. John Roberts, 55 I.D. 430 (1935). Thus, the 20 acres of land in the High Bar claim covering the Oro Grande claim are governed by the provisions of the Act of April 8, 1948, because its effective location date is in 1938.

As previously noted, contest No. Oregon 014538-A against the mining claims at issue was undertaken pursuant to the Act of July 23, 1955, which was enacted to provide for the multiple use of the surface of the public lands among other purposes. 43 CFR 3710.0-3; 43 CFR 185.120 (1964). Section 4 of that Act, 30 U.S.C. § 612 (1976), provides that any mining claim "hereafter located" shall not be used, prior to the issuance of patent, for purposes other than mining and reserves to the United States the right to manage and dispose of the surface resources of such claim. See 43 CFR 3712.1.

Section 5, 30 U.S.C. § 613 (1976), provides a procedure for determining whether mining claims located prior to the date of the Act, July 23, 1955, would be subject to the provisions of section 4. In brief, the procedure provides that the head of a Federal agency responsible for administering the surface resources of lands belonging to the United States may institute proceedings leading to a determination of surface rights by filing with the Secretary of the Interior a request for publication of notice to mining claimants. A mining claimant asserting a right to surface resources must then file a verified statement detailing certain information as to the claim. Failure to file the statement within the required time constitutes the waiver and relinquishment of any right, title, or interest under the mining claim contrary to or in conflict with the limitations and restrictions specified in section 4 of the Act. See 43 CFR 3712.2 through 3712.3. If a verified statement is filed, the Secretary of the Interior must then schedule a hearing to determine the validity and effectiveness of any right, title, or interest under the mining claim asserted by the mining claimant. See 43 CFR 3713.2. In order to establish any right to the surface resources, or, in other words, the inapplicability of section 4, a mining claimant must prove that he made a discovery on his claim within the meaning of the mining laws prior to July 23, 1955. United States v. Payne, 68 I.D. 250 (1961).

Joseph A. Barnes, Julia R. Fisher, and Harvey A. Reed 3/ submitted a verified statement for the Deep Diggings and High Bar placer mining claims to

3/ Julia R. Fisher bequeathed her interest in the mining claims at issue to Harvey A. Reed, her son. Appellants acquired their interests in the claims by mesne conveyance from appellant Joseph Barnes and/or Harvey Reed. See Abstract of Title #12622, Douglas Abstract Co., Roseburg Oregon.

BLM on July 17, 1964. The statement asserted that they claimed "right, title, and interest in the vegetative surface resources and other surface resources under such mining claims as hereinafter described which are contrary to and in conflict with the limitations and restrictions specified in Section 4, 69 Stat. 367, as to the mining claims hereinbelow described." A notice of hearing issued on June 22, 1966, in which BLM asserted that "[a] discovery of valuable minerals has not been made within the limits of any of the unpatented mining claims." Following a mineral report dated August 18, 1966, recommending that the claimant's verified statement be accepted, BLM recognized the rights of the claimants and reported such to the hearing examiner, who then dismissed the proceedings undertaken pursuant to section 5 of the Act of July 23, 1955. Decision on contest No. Oregon 014538-A, dated September 13, 1966; Final Decision on Closing Determination Area, Oregon 014538, dated December 19, 1966, amended January 13, 1981.

Nevertheless, section 7 of the Act, 69 Stat. 372 (codified at 30 U.S.C. § 615 (1976)), provides that:

> Nothing in this Act shall be construed in any manner to limit or restrict or to authorize the limitation or restriction of any existing rights of any claimant under any valid mining claim heretofore located, except as such rights may be limited or restricted as a result of a proceeding pursuant to section 5 of this Act, or as a result of a waiver and relinquishment pursuant to section 6 of this Act; and nothing in this Act shall be construed in any manner to authorize inclusion in any patent hereafter issued under the mining laws of the United States for any mining claim heretofore or hereafter located, of any reservation, limitation, or restriction not otherwise authorized by law, or to limit or repeal any existing authority to include any reservation, limitation, or restriction in any such patent, or to limit or restrict any use of the lands covered by any patented or unpatented mining claim by the United States, its lessees, permittees, and licensees which is otherwise authorized by law.

BLM has consistently interpreted this provision to preserve all rights to a mining claim located prior to the Act that exist on the date of the Act, unless the claimant fails to file a verified statement, or it is determined pursuant to a hearing that the rights asserted in a verified statement are not valid, or the claimant waives his right. 43 CFR 3714.3; 43 CFR 185.137 (1964). BLM has also concluded that although section 7

> preserves to all mining claimants the right to a patent unrestricted by anything in the Act and provides that no limitation, reservation or restriction may be inserted in any mineral patent unless authorized by law, * * * it also makes it clear that all laws in force on the date of its enactment which provide for any such reservation, limitation, or restriction in such patents and all authority of law then existing for the use of lands embraced in unpatented mining claims by the United States, its lessees, permittees, and licensees continue in full force and effect. [Emphasis added.]

43 CFR 3714.3; 43 CFR 185.137(a) (1964).

Accordingly, the effect of the proceedings pursuant to section 5 of the Act of July 23, 1955, in this case was to recognize only the rights to surface resources that appellants held on July 23, 1955. Those rights are defined by the Acts of June 9, 1916, and April 8, 1948. Thus, the reservations of timber and associated rights in patent No. 36-83-0013 are proper.

[5] In conclusion we note that appellants have also argued that the Acts of June 9, 1916, and April 8, 1948, are unconstitutional as written and applied in this case. They assert that they have been denied equal protection as provided by the United States Constitution because others with "similar vested interests" have been granted unrestricted patents. They also contend

that their property has been taken for public use in violation of the Fifth Amendment to the Constitution. As BLM noted in its decision, the Department of the Interior, as an agency of the executive branch of Government, is not the proper forum to decide whether or not a statute enacted by Congress is constitutional. Tesoro Petroleum Corp., 65 IBLA 99 (1982); United States v. Imperial Gold, Inc., 64 IBLA 241 (1982).

However, even if BLM has improperly issued patents without timber reservations to others in exactly the same circumstances as appellant, that is not a sufficient reason for BLM to continue to do so. See George Brennan, Jr., 1 IBLA 4 (1970). The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost through lack of enforcement by some of its officers. Rachalk Production, Inc., 71 IBLA 374 (1983); Kenneth F. Cummings, 62 IBLA 206 (1982); 43 CFR 1810.3(a). Insofar as appellants' Fifth Amendment due process rights are concerned, due process does not require notice and a prior hearing in every case that an individual is deprived of property as the individual is given notice and an opportunity to be heard before the deprivation is final. As we have often stated, even if due process did require the Department of the Interior to afford appellants some form of hearing, the requirement is satisfied by appeal to this Board. Robert J. King, 72 IBLA 75 (1983); H. B. Webb, 34 IBLA 362 (1978).

Appellants have requested that a fact-finding hearing be held in this case. Such hearings may be ordered at the discretion of the Board under 43 CFR 4.415. A hearing is necessary only where there are disputed issues of fact determinative of the legal issues on appeal which require resolution

through the introduction of testimony and other evidence. See United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971). Appellants' request for a hearing is denied because there are no disputed facts controlling the outcome of this appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Oregon State Office is affirmed.

Will A. Irwin
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge